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IN THE
COURT OF APPEALS OF INDIANA

KEVIN MONCRIEF,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0711-CR-975
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila Carlisle, Judge
Cause No. 49G03-0609-MR-183277

MAY 22, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBERTSON, Senior Judge

STATEMENT OF THE CASE

Defendant-Appellant Kevin Moncrief appeals his conviction by jury of voluntary manslaughter as a class A felony as well as his forty-year sentence thereon. We affirm.

ISSUES

1. Whether the trial court erred in giving an instruction on the lesser included offense of voluntary manslaughter.

2. Whether the trial court erred in sentencing Moncrief.

FACTS

The facts most favorable to the verdict reveal that on September 25, 2006, Allen Humphrey and his friends spent the day on Humphrey's front porch drinking "Wild Irish Rose" wine, smoking marijuana, and ingesting cocaine. Tr. p. 81. Later that afternoon, Moncrief, Humphrey's neighbor, walked over to the porch to talk to one of Humphrey's friends. Humphrey called Moncrief a "punk bitch" several times. Tr. p. 110. Five-foot nine-inch, 140-pound Moncrief told five-foot eleven-inch, 238-pound Humphrey that he was not afraid of him, and turned and left the porch.

Moncrief, who appeared scared, went home and got a gun. He called Humphrey over to his front porch and told Humphrey several times to stop "walking on [him]." Tr. p. 353. When Humphrey responded by "chest-bumping" him several times, Moncrief pulled out his gun and shot Humphrey. Humphrey died as a result of the gunshot.

The State charged Moncrief with murder. At trial, the State tendered a voluntary manslaughter instruction. The trial court gave the pattern instruction for voluntary

manslaughter over Moncrief's specific objection that there was no evidence of sudden heat. The jury convicted Moncrief of voluntary manslaughter.

Following a sentencing hearing, the trial court found Moncrief's remorse to be a mitigating factor, and his extensive criminal history, which included a history of confronting others and causing them injury, to be an aggravating factor. After balancing the aggravating and mitigating factors, the trial court sentenced Moncrief to forty-years, with five years suspended. Moncrief appeals his conviction and sentence.

DISCUSSION AND DECISION

I. Jury Instructions

Moncrief argues that the trial court erred in giving the jury a voluntary manslaughter instruction because there is no evidence of the sudden heat. First, our supreme court has stated that it is not erroneous in a murder trial to give the jury a voluntary manslaughter instruction, even in the absence of sudden heat. *Washington v. State*, 685 N.E.2d 724, 728 (Ind. Ct. App. 1997).

Second, we find no error on the merits when we apply our supreme court's three-step test to determine whether the trial court should give an instruction on a lesser-included offense. *See Wright v. State*, 658 N.E.2d 563, 566-67 (Ind. 1995). According to *Wright*, the court should first determine whether the claimed lesser offense is inherently included in the language of the statute. *Id.* If the offense is inherently included, then the court should proceed to step three below. *Id.* Second, if the court determines that the alleged lesser-included offense is not inherently included in the crime charged under stop one, then it must determine whether the claimed offense is factually included in the crime

charged by the charging document. *Id.* Third, if the court determines that the lesser charge is either inherently or factually included, it must determine whether there is evidence before the jury that the lesser-included offense was committed. *Id.* This part of the test hinges on whether a serious evidentiary dispute exists with respect to the element which distinguishes the greater and lesser offenses. *Washington,* 685 N.E.2d at 727.

Applying the first step to this case, it is clear that voluntary manslaughter is an inherently lesser-included offense of murder. *Id.* Voluntary manslaughter is simply murder mitigated by sudden heat. *Id.* Because voluntary manslaughter is a lesser-included offense of murder, we turn to the third stop of the *Wright* analysis, which requires the trial court to determine whether there was evidence before the jury that the lesser-included offense was committed. *Id.*

Killing in the sudden heat of passion is the feature that distinguishes voluntary manslaughter from murder. *Id.* Sudden heat is demonstrated by evidence of anger, rage, sudden resentment, or terror that is sufficient to obscure the reason of an ordinary man. *Id.* To support the giving of a voluntary manslaughter instruction, there must be sufficient provocation to induce such passion to render the defendant incapable of cool reflection. *Id.*

The standard for determining whether a voluntary manslaughter instruction is proper is not a high one. *Id.* The instruction is justified if there is any appreciable evidence of sudden heat. *Id.* Here, the evidence reveals that the victim, who was 100 pounds heavier than Moncrief, taunted Moncrief by calling him a "punk bitch" and by chestbumping him. Moncrief was so angry when Humphrey ignored Moncrief's pleas to

stop "walking on [him]," that Moncrief pulled out a gun and shot Humphrey. This evidence establishes that there was provocation and sudden heat such that a rational basis existed for the finding that Moncrief was not guilty of murder but guilty of voluntary manslaughter. The trial court did not err in giving the instruction.[1] *See id.*

II. Sentence

Moncrief also argues that his sentence is inappropriate. When reviewing a sentence imposed by the trial court, we may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(b). Here, with regard to the character of the offender, Moncrief has a criminal history that includes a history of confronting other people and causing them injury. Moncrief's prior contacts with the law have not caused him to reform himself. With regard to the nature of the offense, Moncrief called one of his neighbors over to his front porch and then shot and killed him. Based upon our review of the evidence, we see nothing in the character of this offender or in the nature of this offense that would suggest that Moncrief's sentence is inappropriate.

[1] Moncrief also argues that the trial court erred in giving the lesser-included offense instruction because the State did not timely tender it. According to Moncrief, he was therefore denied sufficient notice and opportunity to defend to the new charge. However, Moncrief did not object to the instruction on this basis at trial and cannot raise it for the first time on appeal. *See King v. State*, 799 N.E.2d 42, 46 (Ind. Ct. App. 2003), *trans. denied, cert. denied*, 543 U.S. 817 (2004)(explaining that a defendant is limited to the grounds advanced at trial and may not raise a new ground for objection for the first time on appeal).

CONCLUSION

The trial court did not err in instructing the jury on a lesser-included offense or in sentencing Moncrief.

Affirmed.

KIRSCH, J., and DARDEN, J., concur.